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No. 94-876

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL LENNON, ET. AL.,

Petitioners,

vs.

JULIA ALEXANDER, AS EXECUTOR OF THE ESTATE OF HENRY O. QUADE, JR., DECEASED,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent hereby incorporates by reference the Factual Background set forth in the Ninth Circuit's opinion below at 29 F3d 1355, 1357-1359. (Petition A 3-7) In addition, Respondent sets forth additional pertinent facts considered by the Ninth Circuit but not mentioned in Petitioners' Statement Of The Case.

Police were not faced with exigent circumstances prior to entering Mr. Quade's home. (CR 91, Exhibit 6)

At all times during the morning of October 16, 1990, the police could have applied to the Municipal Court for an arrest warrant. (CR 52, Exhibit 8, p. 151)

Police were aware that Mr. Quade had no criminal record of any kind and was in need of professional psychiatric assistance. (ER 6, p. 1;CR 52, Exhibit 6, p. 5, and CR 91,

Exhibit 47, p. 1)

Police were aware prior to entry that Mr. Quade was "half-blind," "mentally unstable," elderly and obese. (ER 4, p. 4; CR 91, Exhibit 9, p. 232)

At no time prior to entering Mr. Quade's home did the police or any other City agency seek or obtain an arrest warrant. (CR 52, Exhibit 8, p. 131)

A Hostage Negotiation Team attempted to contact Mr. Quade by telephone and by means of a bullhorn for approximately 57 minutes. No contact between the Hostage Negotiation Team and Mr. Quade was ever made. (ER 5, p. 1; CR 52, Exhibit 7, p. 1)

While the Hostage Negotiation team was attempting to make contact with Mr. Quade, officers from the Tactical

Squad formulated a plan to enter Mr. Quade's residence in order to arrest Mr. Quade at gunpoint. (ER 3, p. 3; CR 52, Exhibit 1, p. 4)

Members of the tactical unit were trained to shoot to kill if placed in fear for their lives. (ER 4, p. 2; CR 82, Exhibit 9, p. 130)

Police did not attempt to use alternative, less violent ways to take Mr. Quade into custody. (ER 2, p.3; CR 83, p.3)

Less violent alternatives, including waiting to establish communication, the use of a canine unit, and/or the use of tear gas were available to the police on October 16, 1990. (ER 2, p.3; CR 83, p. 3 and CR 91 Exhibit 39, p. 225)

Each of the three alternatives (i.e., waiting to establish

communication, tear gas, canine unit) would have posed less risk of harm to Mr. Quade than breaking down his front door and confronting him with automatic weapons. (ER Exhibit 2, p. 4; CR 83, p. 4 and CR 91, Exhibit 51, p. 221)

As a matter of procedural history, it should be noted that after publication of the Ninth Circuit's opinion in this case, Petitioners moved for a rehearing en banc. Other than Judge Trott, the dissenting judge in the opinion below, not a single judge in the Ninth Circuit requested a vote for rehearing en banc. (Petition D-2)

REASONS WHY THE PETITION SHOULD BE DENIED

A. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition.

Petitioners advance four questions that they contend are presented by the Ninth Circuit's opinion in this case.

Each of these purported questions has been manufactured through a tortured reading of the opinion below and an absurd interpretation of the factual record. None of Petitioners' proffered questions are presented by the Ninth Circuit's opinion or the record in this case.

Petitioners' First Question asks:

> Are police officers liable under 42 U.S.C. Section 1983 for shooting a person in self-defense, where the liability is premised solely on a claim that the police "created the situation" in which the person tried to shoot them?

Petitioners' first question is inappropriate in at least three respects. First, the opinion below does not purport to impose liability upon the officers who shot Mr. Quade in self-

defense. Rather, it permits a jury to decide whether to impose liability on the commanding officers who unreasonably ordered a Swat Team to storm the house of a mentally ill, elderly, half-blind recluse suspected of having a leaky pipe.

Second, Petitioners' presentation of the excessive force issue before discussion of the Payton v. New York, 445 U.S. 573 (1980) violation reverses both the order of analysis in the opinion below and the chronological order of events at Mr. Quade's house on October 16, 1990. The analysis must start with the Payton violation because the excessive force used against Mr. Quade might well have been avoided had an arrest warrant been properly obtained by the police. As Judge Kozinski correctly observed in his separate concurring opinion below:

I seriously doubt a reasonable judicial officer

would have authorized the immediate storming of Quade's residence by a heavily armed tactical team...[Paragraph]...

Under Payton, the potentially fatal decision to confront a suspect within his own home is taken away from those at the scene, whose judgment may be clouded by an understandable, but perhaps misguided, sense of urgency. What is striking about the fact pattern here is the massive disproportionality of the response to the problem of a leaky sewer pipe. I would like to believe that, had Payton been followed, the judicial officer from whom the warrant was sought would have injected a measure of objectivity and detachment, perhaps saving Quade's life. By failing to take this constitutionally-required step, the officers short-circuited the built-in safeguard of the warrant

requirement, costing Quade his life and exposing themselves to liability. (Alexander v. City And County Of San Francisco 29 F.3d 1355, 1368-1369, Petition A-34).

Third, Petitioners' first question incorrectly assumes the fact that liability is premised solely on the fact that police needlessly created the situation which resulted in Mr. Quade's death. As the Ninth Circuit opinion makes clear, Respondent's claim is that Mr. Quade's Fourth Amendment rights were violated because the police actions that created the situation were themselves unreasonable under all of the circumstances confronting the officers at the scene. Alexander, supra at 1366.

The Ninth Circuit's analysis and ruling on the excessive force claim adheres strictly to the factors enumerated by this Court in Graham v. Connor 490 U.S.

386, 396 (1989). See, Alexander, supra at 2366-1367 (Petition A28-A29) The opinion below does not depart from well established precedent of this Court, and review is unwarranted.

Petitioners' Second Question asks:

> For purposes of qualified immunity, is the law clearly established that police officers may be liable for shooting a person in self-defense, where liability is premised upon police actions taken before the shooting and where every prior appellate decision to consider such liability has rejected it?

As noted above, the police officers who acted in self-defense are not the defendants in this case. As the opinion below correctly held, factual disputes make the instant case

inappropriate for summary judgment both on the merits and on the qualified immunity claim. (Petition A-29) The Ninth Circuit's finding of factual disputes does not raise an issue for review by this Court.

Petitioners' Third Questions asks:

> Where police officers are in the course of executing a forcible entry warrant, does the Fourth Amendment require the officers to stop and obtain an arrest warrant once the officers have determined to arrest the occupant because he threatened to shoot them?

The question as phrased seems to suggest that police faced exigent circumstances that might excuse their lack of an arrest warrant. As the opinion below points out, police did not argue exigent circumstances to the Ninth Circuit because

such a contention is flatly contradicted by the record. Alexander, supra at 1365 note 11. (Petition A-25) Moreover, police did not have to "stop" anything in order to obtain an arrest warrant. The police decision to proceed without an arrest warrant was made during stable conditions without time pressures of any sort.

The opinion below correctly preserves the distinction between administrative inspection warrants and arrest warrants issued upon a traditional showing of criminal probable cause. This distinction goes to the very heart of the protections afforded by the Fourth Amendment, and the Ninth Circuit reached the correct decision in light of this Court's rulings in Payton, supra and Michigan v. Clifford 464 U.S. 287 (1984). The opinion below simply reaffirms the longstanding rule that absent exigent circumstances, police must obtain a criminal arrest warrant in order to enter the home to arrest. There is nothing about this ruling that

justifies review by the Court.

Petitioners' Fourth Question asks:

> For purposes of qualified immunity, is the law clearly established that police officers may not enter a house to arrest an occupant without an arrest warrant, where the occupant threatened to shoot the officers as they prepared to execute a forcible entry warrant?

For purposes of qualified immunity, the real question is whether the law was clearly established that police may enter a home to arrest only if they possess a valid arrest warrant or are confronted with exigent circumstances. This was the holding in Payton, supra and it was clearly established in October of 1990. As noted above, the record in the instant case reveals that there were no exigent

circumstances confronting officers that would have excused their lack of an arrest warrant. Accordingly, if the police entered to arrest Mr. Quade, they committed a classic Payton violation for which they are not entitled to qualified immunity.

B. The Ninth Circuit's Opinion Does Not Conflict With The Decisions Of Other Circuits.

Contrary to Petitioners' assertion that there is a conflict between the instant opinion and the decisions of seven other circuits, a careful reading discloses that the Ninth Circuit's opinion is distinguishable on both law and facts.

None of the cases purported to conflict with the opinion involved an on-going constitutional violation that contributed directly to the excessive force claim. As noted above, had police complied with Payton and obtained an arrest warrant, the excessive force claim may never have

arisen.

Furthermore, the cases cited by Petitioners which involve exigent circumstances have no relevance. The instant case involves no exigent circumstances. Police had unlimited time to determine how to proceed at Mr. Quade's home on October 16, 1990. Therefore, there is no issue as to "split second judgements" made under pressure. See Graham v. Connor, supra at 397 (1989)

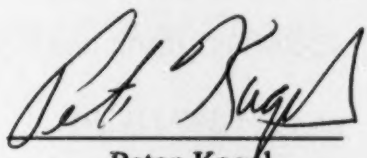
The seizure in the case at bench was inextricably bound up with the command decision to storm Mr. Quade's home with a tactical team. It is impossible to divorce the tragic confrontation between Mr. Quade and the officers who had entered his home from the patently unreasonable command decision to send those officers into Mr. Quade's home in the first place. It forms a part of the totality of circumstances that must be reviewed in an excessive force

claim. Given the unique fact pattern of the instant case, review by this Court is unwarranted.

The Petition should be denied.

Dated: December 6, 1994

Respectfully submitted,



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